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IN THE

Supreme Court of the United States

TERM OF OCTOBER, 1971

No. 71 - 843

COUNTY OF WAYNE and THE BOARD OF SUPERVISORS OF THE COUNTY OF WAYNE, BOARD OF AUDITORS OF WAYNE COUNTY, TREASURER OF WAYNE COUNTY,
Petitioners-Defendants,
v.
JUDGES FOR THE THIRD JUDICIAL CIRCUIT OF THE STATE OF MICHIGAN,
Respondents-Plaintiffs.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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Petitioners-Defendants,

v.

JUDGES FOR THE THIRD JUDICIAL CIRCUIT OF THE STATE OF MICHIGAN,
Respondents-Plaintiffs.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

To: *The Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States.*

Petitioners-defendants pray that a Writ of Certiorari issue to review the decision of the Supreme Court of the State of Michigan entered in the above-entitled cause on September 30, 1971. The decision for which review herein is sought reversed an earlier decision of that Court in this same cause reported in 172 N.W. 2d 436 and 383 Mich. 10

(1969), and adopted as its latest final decision a dissenting opinion to that decision, reported in 172 N.W. 2d 445 and 383 Mich. 33. A timely Application for Rehearing was filed by petitioners and denied on November 9, 1971.

A. OPINIONS AND JUDGMENTS BELOW

The latest decision of the Michigan Supreme Court in this cause entered on September 30, 1971, is as yet unreported and appears herein as Appendix A. The original judgment and the amendment of judgment reinstated by this decision appear herein as Appendix B and C, respectively. The earlier decision reached by that Court in this same cause reported in 172 N.W. 2d 436 and 383 Mich. 10 (1969) appears herein as Appendix D, and the judgment entered pursuant thereto which was in effect until September 30, 1971, appears herein as Appendix E. The dissenting opinion to the earlier decision, reported in 172 N.W. 2d 445 and 383 Mich. 33, and adopted by the Court as its latest decision in this cause, appears herein as Appendix F. The Order denying rehearing of the Opinion and Order of September 30, 1971, appears herein as Appendix G.

B. JURISDICTION

As hereinabove noted, the decision of the Michigan Supreme Court entered on September 30, 1971, Appendix A, reversed an earlier decision of that Court in this same cause, Appendix D, and adopted as it latest final decision a dissenting opinion to the earlier decision, Appendix F. A timely motion for rehearing was filed by petitioners and denied on November 9, 1971, Appendix G.

Jurisdiction of this Court to issue its Writ of Certiorari is invoked under C 646, 62 Stat 929 (28 USCA 1257 (3)), inasmuch as the validity of the decision of the Supreme Court of Michigan is brought into question on grounds of repugnancy to the Constitution of the United States.

C. QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review:

(1) Does due process of law, as prescribed by the Fourteenth Amendment of the Constitution of the United States and by Article I, Sec. 17 of the Michigan Constitution of 1963, prohibit a county circuit court judge from hearing a matter in which that circuit court has a direct interest?

(2) Are county circuit court judges or any members of the state judiciary, including justices of the Supreme Court of Michigan, under the separation of powers doctrine enunciated by the Constitution of the United States and the Michigan Constitution of 1963 (Article III, Sec. 2) prohibited from interfering with the legislative body of county government to compel additional appropriations for the county court, where in the considered judgment of the county legislative body, such additional appropriations are not feasible?

(3) Does a county circuit court, or any court within the state judiciary, including the Michigan Supreme Court, possess an inherent power to appoint officers and all other employees of a county circuit court, to determine their salaries and to mandamus the legislative body of the county for payment thereof, in view of the fact that the said legislative body of the county is empowered by the Michigan Constitution and the Michigan statutes to de-

termine the number of such appointments and to make provision for their compensation; or does the exercise of an inherent court power in this manner constitute judicial despotism and a denial of the republican form of government guaranteed by Article IV, Sec. 4 of the United States Constitution by usurping the lawful powers of the coordinate and independent branch of county government?

D. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following are involved in the determination of this case:

Article I, Sec. 1 of the United States Constitution; Article II, Sec. 1 of the United States Constitution; Article III, Sec. 1 of the United States Constitution; Article IV, Sec. 4 of the United States Constitution; and the Fourteenth Amendment, Sec. 1 of the United States Constitution; Article I, Sec. 17 of the Michigan Constitution of 1963; Article III, Sec. 2 of the Michigan Constitution of 1963; Article VII, Sec. 8 of the Michigan Constitution of 1963; Michigan Statutes Annotated, 5.331, paragraphs 9, 16 and 17; 5.1191 (12)(f); 27A.1471; 27A.1481; 28.1137; 28.2295 and 28.2296.

Pertinent parts of the foregoing are set forth in Appendix H.

E. STATEMENT OF THE CASE

In the fall of 1967, while the Board of Supervisors for the County of Wayne, Michigan,[1] one of the petitioners herein, was considering its budget for the fiscal year 1967-1968, the Judges of the Third Judicial Circuit of the State of Michigan (hereinafter referred to as "Wayne County Judges"), respondents herein, requested that certain additions of court personnel be included in the budget. This increase of court personnel, as originally requested, consisted of seven Probation Officers I, four Law Research Clerks, and one Judicial Assistant.

Pursuant to the procedure set up under Michigan law, these requests by the Wayne County Judges were referred to the Board of Aditors (hereinafter referred to as "Auditors"), another petitioner herein, for its study and recommendation. Subsequently, the Auditors recommended that of the seven Probation Officers I requested, two positions be filled; of the four Law Research Clerks requested, two positions be filled; and that the position of Judicial Assistants not be filled. The prime factor involved in the study and recommendation of the Auditors was the financial ability of the County to meet requests for increased personnel from current revenue.

The Ways and Means Committee, the body charged with making final recommendations to the Supervisors, rejected the recommendation of the Auditors for the appointment of two Probation Officers I, but did accept the Auditors' recommendation for the appointment of two

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[1] Now known as the Wayne County Board of Commissioners, but to avoid confusion, especially when referring to statutes, hereinafter designated as "Supervisors."

Law Research Clerks, and tentatively fixed the starting salary for these positions at the rate of $7,746.00 per annum.

In an effort to have the matter of additional court personnel reviewed, the presiding judge of the Wayne County Circuit Court sent a letter to the chairman of the Supervisors dated November 1, 1967, requesting the appointment of a special committee. This request was honored by the appointment of a special subcommittee on court matters. While the subcommittee was considering the whole matter of additional court personnel, the presiding judge revised the earlier requests of the Wayne County Judges by "demanding" the appointment of eleven Probation Officers at a minimum salary of $8,736.00 per year, eight Law Research Clerks at a minimum salary of $8,500.00[2] and one Judicial Assistant at a salary of $25,000.00 per year in a letter to the chairman of the Board of Supervisors dated March 11, 1968.

On April 2, 1968, the Wayne County Judges filed a complaint for a writ of mandamus in their own circuit court and secured a show cause against petitioners as to why such a writ should not be issued. The Wayne County Judges also sought in this action a declaratory judgment that they had the inherent right and power to compel the Supervisors to appropriate sufficient funds to enable the Wayne County Judges to employ and compensate additional court personnel as determined by the Judges themselves. The Michigan Supreme Court Administrator appointed Judge William J. Beer of the Oakland County Circuit Court to hear this matter as a visiting judge in the Wayne County Circuit Court.

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[2] Later changed to $9,000.00.

The petitioners at the outset were of the opinion that the action instituted by the Wayne County Judges was constitutionally untenable for two principal reasons:

(1) The subject matter of the issue involved and the ultimate outcome, namely, whether a circuit court could control both the appointment and compensation of its own personnel, or whether such appointment and compensation were controlled by the Michigan Statutes appertaining thereto, could affect all circuit judges and therefore due process of law required that some neutral procedural forum, rather than a circuit court, and certainly not a circuit judge sitting in the judicial circuit involved as a party litigant, should hear this matter.

(2) Under the separation of powers dostrine extant under both federal and state constitutions, the judiciary could not encroach upon powers delegated by law to a county board of supervisors, its legislative body, by demanding that it appropriate funds for specific purposes or personnel, contrary to the judgment and discretion of the Supervisors.

For these and other reasons petitioners applied for a writ of superintending control to the Michigan Court of Appeals (Case No. 5415) and almost immediately afterward filed a similar application for a writ of superintending control with the Michigan Supreme Court prior to the decision of the Court of Appeals (Case No. WM 4-384). Respondents also filed a similar application for superintending control in the Supreme Court (Case No. WM 4-385). All applications for writs of superintending control were denied by both the Supreme Court and the Court of Appeals, as was also petitioners' emergency application for leave to appeal, subsequently filed in the Michigan Supreme Court (Case No. 52084).

Trial of this matter before Judge Beer commenced on September 16, 1968. At the conclusion of petitioners'

proofs, counsel for the Wayne County Judges moved for entry of a summary judgment which was granted by the trial court on September 18, 1968. By an opinion rendered on that day, however, the trial court provided that the writ of mandamus not issue before December 10, 1968, and the judgment issue on October 15, 1968, provided accordingly, Appendix B.

On November 14, 1968, the trial judge on motion of the respondents and over the objection of the petitioners granted an amendment of the judgment of October 15, 1968, by ordering the writ of mandamus to issue immediately, rather than after December 10, 1968. The amendment of judgment, Appendix C, was entered November 27, 1968. Petitioners on November 18, 1968, had filed their motion for immediate consideration of their emergency application for stay pending appeal which was granted first by the order of the Court of Appeals dated November 22, 1968, and subsequently amended by that court's Order of November 28, 1968. The Order of November 28, 1968, also shortened the appeal schedule in this cause, and oral argument was held on December 20, 1968. On February 10, 1969, the Court of Appeals issued its opinion, affirming the judgment of the trial court. Petitioners filed their application for leave to appeal to the Michigan Supreme Court which was subsequently granted.

Oral argument was held before the Supreme Court on June 4, 1969, and that Court issued its majority decision[3]

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[3] It should also be noted that this decision declared unconstitutional that part of a state statute (M.S.A. 28.2296, Appendix H herein) which barred state financial aid for the employment of additional probation officers to counties with a population in excess of 500,000; and that therefore the petitioner County (with a population of nearly 3,000,000) could qualify for such state aid. The validity or non-validity of this statutory population limitation is not mentioned in the per curiam Opinion and Order of September 30, 1971, and is seemingly now "in limbo."

(reported in 172 N.W. 2d 432 and 383 Mich. 10) on December 9, 1969, Appendix D. Dissenting opinions to the majority decision are also reported in 172 N.W. 2d and 383 Mich. commencing at pages 445 and 33, respectively. The majority decision reversed the judgments of the trial court and a new judgment was entered pursuant to the majority decision on February 20, 1970, Appendix E.

On March 5, 1970, respondents filed a Motion for Leave to File Delayed Motion for Rehearing, which although objected to by petitioners was granted by the Court. After further briefs and motions (but no oral argument) a majority of the Supreme Court on September 30, 1971, issued its decision, Appendix A, reversing its earlier decision, Appendix D, and adopting as its new decision a dissenting opinion issued concurrently with the earlier decision, Appendix F. An Application for Rehearing, timely filed by the petitioners on October 20, 1971, was denied by the Supreme Court of Michigan on November 9, 1971, Appendix G. The constitutional questions with respect to due process, separation of powers and denial of a republican form of government were raised by the petitioners both at the trial level and in briefs and oral argument before the Michigan Court of Appeals and the Michigan Supreme Court of Michigan, and in their Application for Rehearing before the Michigan Supreme Court.

F. REASONS FOR GRANTING WRIT

The situation extant in this cause is fraught with many unresolved questions under the Constitution of the United States as well as the Michigan Constitution of 1963 as hereinabove noted. Although this situation has occurred in a number of other states, it has only been judicially reviewed by state tribunals, never by this Court.[4]

Curiously, as pointed out by the brief of an amicus curiae in this cause filed before the Michigan Supreme Court, that Court, in its latest decision, Appendix A, relied on the authority of *Commonwealth ex rel Carroll v Tate,* (1971), 442 Pa. 445; 27A 2nd 193. The Supreme Court of Pennsylvania in the *Tate* case, *supra,* had in turn cited the December 9, 1969 decision of the Michigan Court, Appendix D, as precedent for its holding of judicial supremacy over legislative bodies. In the words of this amicus, "This is bootstrapping of a high order."

Historically, there has always been an adverse reaction to the usurpation of power by one branch of government from another. In 1301, driven by excesses of the crown, the English parliament literally threatened and cajoled King Edward I into granting a new confirmation of both charters and other reforms, the effects of which are summarized by Winston Churchill in his work "The History of the English Speaking Peoples" thus (Vol. 1, Page 297):

> "By this crisis and its manner of resolution, two principles had been established from which important consequences flowed. One was that the King had no right to despatch the feudal host wherever

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[4] We do not consider the denial of a petition for a Writ of Certiorari by this Court in *Commonwealth ex rel Carroll v. Tate,* (1971), 442 Pa. 445, 27A 2nd 193, to be in the nature of a judicial review.

he might choose. This limitation sounded the death-knell of the feudal levy, and inexorably led in the following century to the rise of indentured armies serving for pay. The second point of principle now recognized was that the King could not plead 'urgent necessity' as a reason for imposing taxation without consent. Other English monarchs as late as the seventeenth century were to make the attempt. But by Edward's failure a precedent had been set up, and a long stride had been taken towards the dependence of the Crown upon Parliamentary grants."

Thus we might note, parenthetically, that the exclusive right of the legislature both to provide and control the flow of funds to meet the needs of government became a part of our system nearly seven centuries ago. But, to return to our usurpation of power theme.

In 1628 King Charles I dissolved the English parliament because it was reluctant to grant him all the funds that he though he required for the performance of his duties, regardless of the feasibility of appropriations. When parliament reconvened 11 years later, it in turn began stripping the sovereign and the courts of all the powers traditionally exercised by them, going even to the extent of passing a Bill of Attainder in order to execute the Earl of Stratford. Later in due course parliament fell into the hands of Cromwell "the Lord Protector" who ruled England for several years as a dictator. History recounts his subsequent downfall.

All of the above points to the fact that despotism contains the seed of its own destruction. Our democratic system of checks and balances must be maintained and the doctrine of separation of powers scrupulously observed and protected against any and all encroachments if our republican form of government, federal and state, is to remain sound and viable.

Mr. Justice Paul L. Adams, in his dissent to the majority opinion of the Supreme Court of Michigan, of December 9, 1969, in this cause, Appendix E, made these very pertinent comments concerning the exercise by courts of their inherent power (172 N.W. 2d 450-451; 383 Mich 43-44):

> "I would use the inherent power of the courts only in those cases where it is essential to assure the continued existence or basic functioning of the courts. The test I would apply would be the ability of a court to operate as a court, not whether the court can operate more conveniently or expeditiously if it has some additional means to carry out its functions. For example, a court stenographer is essential for the proper functioning of a court of record. If one were not provided, a court of record under its inherent power could supply one and compel the payment of an adequate salary.
>
> "I cannot agree, however, that the law clerks, probationary officers or a judicial assistant are so essential to the operation of the circuit court of Wayne county as to be a proper case for involving the doctrine of inherent power of the courts. I agree that the courts would operate more efficiently if the judges were provided with law clerks, if the judges had adequate probation services, and if the court had a judicial assistant. In the case of probation officers, I would concede that the question is indeed a close one. But a line must be drawn and, as I have indicated, I would draw it narrowly. I am convinced that the courts will continue to function even if they are not provided with these services. The cost is not insignificant—at least $200,000 per year. Consequently, this case involves a direct confrontation between the inherent

judicial power of the courts and the legislative power to make appropriations. One or the other must give. Under our theory of government, the legislature or a subordinate legislative body has the power to appropriate for all branches of government. Both the executive and judicial branches are required to present their fiscal needs to the legislative branch for consideration by that branch and allocation of available funds to all three branches of government based upon a legislative decision. This is the process that should be followed here."[5]

Justice Adams also vigorously voiced his dissent to the per curiam Opinion and Order of his colleagues of September 30, 1971, which, because it so eloquently points up the dilemma facing the petitioners in this instant cause, we have appended hereto in its entirety as Appendix J.

This very Court, through its many eminent jurists, has time and time again enunciated the doctrine of judicial restraint in reviewing matters which pertain to the exercise of its own power vis-a-vis those of the legislative and executive branches of government. While we could cite many, we believe the following statement of the late Mr. Justice Harlan Fiske Stone succinctly but aptly best expresses this philosophy:

> "While unconstitutional exercise of power by executive and legislative branches of the Government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of restraint."[6]

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[5] The complete text of Justice Adams' dissent to the December 9, 1969 decision is included herein as Appendix I.

[6] Excerpted from *Life*, December 15, 1971 issue, page 56.

Perhaps it is incumbent upon us to be a bit less literary and more precise. In our view of this matter the writ should be granted specifically in the instant cause for the following two cogent reasons:

A. Under the separation of powers doctrine enunciated in both the United States and Michigan Constitutions,[7] circuit court judges are prohibited from exercising legislative, administrative or executive powers vested by law elsewhere in county government. The effect of the latest per curiam Opinion and Order of the Supreme Court of Michigan entered in this cause on September 30, 1971, not only violates this separation of powers doctrine but also denies to the Petitioner Wayne County, a political subdivision and an arm of the State of Michigan, a republican form of government guaranteed by the Constitution of the United States, Article IV, Sec. 4.

B. Due process of law, as provided under the United States Constitution,[8] requires that every litigant be afforded a neutral forum. Therefore a complaint for mandamus filed for the benefit of the respondents herein, the judges for the third judicial circuit, cannot be heard by any judge of that same third judicial circuit without violating the due process of law clauses of both the United States and Michigan Constitutions. The per curiam Opinion and Order of the Supreme Court of Michigan affirms a judgment of such a hearing.

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[7] Constitution of the United States, Art. I, Sec. 1, Art. II, Sec. 1, Art. III, Sec. 1, Appendix H; Michigan Constitution of 1963, Art. III, Sec. 2, Appendix H.

[8] Constitution of the United States, XIV Amendment, Sec. 1, Appendix H. Michigan Constitution of 1963, Art. I, Sec. 17, Appendix H.

CONCLUSION

Wherefore, Petitioners pray that this Honorable Court grant a writ of certiorari to review the latest per curiam Opinion and Order of the Supreme Court of Michigan in this cause rendered September 30, 1971.

Respectfully submitted,

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Dated: December 23, 1971

APPENDIX A

(State of Michigan—Supreme Court)

The Judges for the Third Judicial Circuit of the State of Michigan, *Plaintiffs-Appellees,* v. County of Wayne and the Board of Supervisors of the County of Wayne, Board of Auditors of Wayne County, Treasurer of Wayne County, *Defendants-Appellants*	No. 52381

ON REHEARING

Before the Entire Bench
Per Curiam

Since our opinions on former review of this consequential appeal were released, *Wayne Circuit Judges v. Wayne County* [1969], 383 Mich 10, the opinion endorsed at the time by Justices Dethmers and Black has been authenticated by decisions handed down by the Supreme Court of Missouri *(State ex rel Weinstein v. St. Louis County* [1970],.....Mo....., 451 SW 2d 99; expressly quoting and following *Noble County Council v. State ex rel Fifer* [1955], 234 Ind 172, 125 NE2d 709) and by the Supreme Court of Pennsylvania *(Commonwealth ex rel Carroll v. Tate* [1971]), 442 Pa 45, 274 A 2d 193).

In view of the developing strength of the principle of inherent power and duty of the judiciary, called into play as it was by the opinion of Justices Dethmers and Black

aforesaid, this Court is constrained on rehearing to adopt that opinion; adding only that the judiciary, in Michigan's instance our "one court of justice" (Const 1963, art 6, §1), *must* stand foursquare in support of the constitutional doctrines which, most recently in the *Tate Case,* were declared. "Must" we have accented, just as the *Tate* court stressed "must possess" in this terse and pointed summary of constitutional necessity *(Tate* at....):

> "Expressed in other words, the Judiciary *must possess* the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer Justice, if it is to be in reality a co-equal, independent Branch of our Government. This principle has long been recognized, not only in this Commonwealth but also throughout the Nation."

Upon due consideration of the foregoing, it is ordered that the Dethmers-Black opinion of 1969 be and become the opinion of the Court on rehearing; that it supersede the other opinions filed December 8, 1969; that the respective judgments of the circuit court and Court of Appeals (15 Mich App 713) be and they are affirmed, and that the defendants be and they are granted a period of 60 days, from and after release of the instant opinion and order, within which to prepare for and then execute the presently upheld peremptory writ.

To guard against all possibility of abuse of the authority, this opinion confirms, and to guard for that matter against even the appearance of any such abuse, an administrative order will enter separately, providing that no judge of a subordinate court may hereafter, by peremptory writ or otherwise, order the expenditure of pub-

lic funds for any judicially required purpose until such judge has submitted his proposed writ or order to the constitutional office of Court Administrator (Const 1963, Art 6, § 3), and has obtained due approval thereof by that office. The order will provide that such restraint shall not apply to orders for payment of trial or appellate costs in cases where the same are due for entry on behall of indigent defendants accused or convicted of felony.

Eugene F. Black
Thomas M. Kavanagh
Thomas Giles Kavanagh
G. Mennen Williams
John B. Swainson

APPENDIX B

JUDGMENT ENTERED OCTOBER 15, 1968, IN WAYNE COUNTY CIRCUIT COURT

(Case No. 107--252)

(Circuit Court for the County of Wayne)

A Complaint for mandamus and declaration of rights having been filed in this action on April 1, 1968, which Complaint was subsequently amended, and an Order to Show Cause having been issued herein, and the Answer of Defendants having been filed; and this cause having been brought on for hearing, whereupon evidence was received in open court and Defendants made their return to the Order to Show Cause and rested, and Plaintiffs thereupon made motion for entry of judgment, and the Court having considered the evidence, oral arguments and written briefs of the parties, and the Court having entered an

opinion on September 18, 1968, granting Plaintiffs' motion, in which the Court made findings of fact and stated conclusions of law, which are hereby incorporated herein by reference, and the Court hereby in supplementation, but not in limitation, of the findings of fact made in such opinion, hereby finds that:

(a) Defendants have not shown any cause why Plaintiffs are not entitled to the relief prayed for by them, and

(b) Plaintiffs' requests for additional probation officers, additional law clerks, and a Judicial Assistant, and the compensation to be paid to such personnel, are reasonable and proper and necessary, and

(c) Defendants have offered no evidence that Plaintiffs' requests for such personnel and the compensation to be paid them are unreasonable or arbitrary, and defendants have not factually met the burden required of them, and

(d) The defendant County did have the available, financial ability, if it had wanted to exercise it, to comply with Plaintiffs' requests for additional personnel, as aforesaid, and

(e) Under the applicable statute, C.L. '48 §600.1471, M.S.A. 27A.1471, plaintiff Wayne County Circuit Court may employ law clerks for the Court or for each Judge of said Court and may fix the compensation for such law clerks, which compensation must be paid by defendant County absent any showing why defendant County by competent evidence or any finding by this Court that such compensation fixed by Plaintiff was arbitrary or unreasonable, and

(f) Under the applicable statute, C.L. '48 §600.1481, M.S.A. 27A.1481, the Plaintiff Wayne County Circuit Court having more than ten Circuit Judges, may employ a Judicial Assistant for such Court and may fix the compensation for such Judicial Assistant, which compensation must be paid by defendant County absent any showing by defendant County by competent evidence and a finding by this Court that such compensation fixed by plaintiff was arbitrary or unreasonable, and

(f) The Defendants herein have not disputed in any way the necessity or the reasonableness of Plaintiffs' actions with respect to the appointment and compensation of such probation officers, law clerks and Judicial Assistant, and

(g) Plaintiffs are entitled to all of the relief prayed for them in the Complaint as amended.

Now, Therefore:

It is Adjudged that the Plaintiffs are entitled immediately to appoint:

(a) 11 additional probation officers for the Wayne County Circuit Court, at a minimum salary of $8,736.00 per annum each;

(b) A judicial Assistant for the Wayne County Circuit Court, at a minimum salary of $25,000.00 per annum;

(c) 8 additional law clerks for the Wayne County Circuit Court at a minimum salary of $9,000.00 per annum each.

It is Further Adjudged that Plaintiffs presently have the clear legal right to procure the appointment of such

personnel and at such compensation as aforesaid, and that it is presently the clear legal and mandatory duty of Defendants to appropriate, furnish and make available, sufficient funds forthwith to permit such employment of such personnel at such compensation as aforesaid.

It is Therefore Hereby Ordered that Defendants herein forthwith take all such requisite action to appropriate, provide or make available the funds required to permit such immediate appointment and compensation of such personnel, as hereinbefore stated.

It is Also Adjudged that Plaintiffs had and have inherent power to employ their own counsel to represent them in these proceedings, including any appeal therefrom, and that such counsel is entitled to reasonable compensation for legal services, and for disbursements to be paid by Defendants as a proper and valid charge against defendant County.

It is Therefore Hereby Ordered that Defendants pay counsel for Plaintiffs, for services rendered and disbursements incurred in these proceedings, immediately upon rendition of counsel's statement therefor, subject, however, to this Court's retention of jurisdiction to determine the reasonableness of such charges for services and disbursements in the event only that Defendants dispute the reasonableness thereof.

It is Further Ordered that Defendants pay such counsel for Plaintiffs for all services rendered and costs incurred in connection with any further proceedings in this matter, including any appeals from this Judgment, and this Court further retains jurisdiction for the purpose of awarding such further compensation and passing upon the reasonableness thereof in the event of any dispute.

It is Further Ordered that this Court retain jurisdiction over these proceedings to insure compliance with all of the Court's orders, hereinbefore stated.

Writ of mandamus may issue, if necessary, after December 10, 1968.

William John Beer,
Circuit Judge.

APPENDIX C

AMENDMENTS OF JUDGEMENTS ENTERED NOVEMBER 27, 1968

(Case No. 107-252)

(Circuit Court for the County of Wayne)

At a session of said Court held in the First Federal Building, Detroit, Wayne County, Michigan, this 27th day of November, 1968.

Honorable William John Beer, Circuit Judge.

This matter came on for hearing on the motion of Plaintiffs for Amendment of Judgment; the Court having considered the motion of Plaintiffs and the affidavit in support thereof, and having heard from counsel in open Court:

Now Therefore:

It is Hereby Ordered that the judgment heretofore entered in this cause on October 15, 1968, be and the same is hereby amended by deleting therefrom the last paragraph of said judgment, which provides:

> "Writ of Mandamus may issue, if necessary, after December 10, 1968."

It is Further Ordered that a Writ of Mandamus may issue forthwith in this cause commanding defendants herein immediately to take all such action as may be necessary or proper to appropriate, provide, or make available, the funds required to permit the immediate appointment and compensation of such personnel as provided for in this Court's judgment of October 15, 1968.

It is Further Ordered that in all other respects said judgment of October 15, 1968, is hereby ratified and confirmed.

William John Beer,
Circuit Judge.

Notice of presentment waived.

Aloysius J. Suchy,
Assistant Prosecuting Attorney,
Attorney for Defendants.

APPENDIX D

(State of Michigan—Supreme Court)

The Judges for the Third Judicial Circuit of the State of Michigan,
Plaintiffs-Appellees,
v.
County of Wayne and the Board of Supervisors of the County of Wayne, Board of Auditors of Wayne County, Treasurer of Wayne County,
Defendants-Appellants

No. 52381

Before the Entire Bench
Brennan, C. J.

THE CASE

This action is brought by the judges of the third judicial circuit of Michigan against the defendant county and its officers, praying for mandamus and certain declaratory relief. The facts of the case will appear in the body of the opinion.

First Issue: Mandamus

This Court declines to affirm the issuance of mandamus at this time as prayed. See *Commonwealth of Virginia v. State of West Virginia* (1918), 246 US 565, 604.

Second Issue: DECLARATORY RELIEF

This Court has jurisdiction in the interest of the administration of justice, pursuant to GCR 1963, 865.1(7), to act upon plaintiffs' petition for a declaration of rights.

"However, it should be noted that the plaintiffs, in their bill of complaint, ask for a declaratory decree, to settle controlling questions of law; and counsel for the city likewise ask that we decide the merits of the questions raised here in order to have an early decision, because of the need for prompt relief of congested traffic and parking conditions in Detroit and to avoid any further delay in the issuance of revenue bonds. With that in mind, instead of taking a short cut by deciding the matter on the ground that the plaintiffs have no standing in court, we have concluded to follow the method recently adopted in the *Nichols Case, supra,* and decide the merits of the questions raised." *City of Detroit v. Wayne Circuit Judges,* 339 Mich 62, 71.

Third Issue:

THE INHERENT POWER OF COURTS

The three powers of government are separated in Michigan by constitutional mandate. Const 1963, art 3, § 2.

The judicial power of this State is vested in one court of justice. Const 1963, art 6, §1.

Judicial power is the power to decide cases between contending parties and to determine legal rights in other cases where permitted by law. See Const 1963, art 3, §8.

In *Attorney General, ex rel Cook v. O'Neill,* 280 Mich 649, reference is made to the separation of the three great powers of government, being as distinct and independent of each other as the nature of society and the imperfections of human institutions will permit.

It is the imperfection of human institutions which gives rise to our notion of inherent power. It is simply impos-

sible for a judge to do nothing but judge; a legislator to do nothing but legislate; a governor to do nothing but execute the laws. The proper exercise of each of these three great powers of government necessarily includes some ancillary inherent capacity to do things which are normally done by the other departments.

Thus, both the legislative department and the judicial department have certain housekeeping chores which are prerequisite to the exercise of legislative and judicial power. And, to accomplish these housekeeping chores both departments have inherently a measure of administrative authority not unlike that primarily and exclusively vested in the executive department.

The inherent power of the judiciary is a judicial power, but only in the sense that it is a natural necessary concomitant to the judicial power.

The inherent power of the court is non-adjudicatory. It does not deal with justiciable matters. It relates to the administration of the business of the Court.

In the constitutional scheme of things, the largest measure of this inherent power is vested in the Supreme Court. To this Court falls the constitutional responsibility to superintend the administration of justice throughout the State. The assignment of judges, the advancement of judicial education, the maintenance of judicial statistics, the division of judicial business, the supervision of the Bar, are all technically administrative functions, but they are reposed in the Court by the same Constitution which declares the absolute separation of governmental powers. That this Court has the inherent power to fulfill its mandate cannot be doubted. Not the least of the duties of this Court is the function of assessing and declaring the needs of the administration of justice. In the discharge of this

duty, the Court exercises its inherent power to prepare and submit a judicial budget and to support and urge in the executive chambers and the legislative halls those fiscal, organizational and other measures which are deemed expedient and needful to the convenient and efficient administration of justice. Similarly, this Court and the circuit courts have the responsibility and the power to assess and declare the needs of the judiciary and the administration of justice on the local level.

This broad power to assess and declare the needs of administering justice does not usurp the fiscal authority of the legislative department. The courts do not levy taxes, or appropriate public monies. These things must be done by the legislative bodies, whose responsibility it is to supply the needs, not only of the administration of justice but also of all those other areas of public concern which are proper subjects for governmental action.

Nevertheless, the inherent power of courts is not exhausted when the needs of administration of justice have been declared and urged upon the legislative councils.

There remains a narrower area in which the courts have inherent power to go further than merely declare the existence of a need. It is an area in which the courts have inherent power to bind the State or the county contractually.

It is clear that our Constitution established an independent co-equal judicial branch of government. It is clear that the operation of this co-equal branch of government is one of the proper expenses of state government, for which taxes must be levied (Const 1963, art 9, §1), and with which executive fiscal policies may not interfere (Const 1963, art 5, § 20).

If, therefore, a particular item of expense is necessary to the effectively continuing functioning of the Court, that item must be paid. In this context, we do not use the broader phrase "needs of administration of justice." Instead, we deliberately choose the narrowed term "necessary to the effectively continuing functioning of the court." The test is not *relative need*, but *practical necessity*.

We do not propose here to itemize those expenses which are necessaries. What may be deemed necessary for an appellate court may not be essential in a trial court. What may be crucial in a metropolitan court may be superfluous in the hinterlands.

Fourth Issue:

INHERENT POWERS, HOW THEY ARE EXERCISED

A judge by presuming to act contractually in the exercise of inherent powers does not adjudicate anything. He acts administratively. Tested judicially, his action may be *ultra vires* if factually it should appear that the expense incurred was not practically necessary to the effectively continuing operation of the court.

A reading of article 9, § 22, Constitution 1963, together with the court of claims act, PA 1961, No 236 (MCLA §§ 600.6401-600.6475, Stat Ann 1962 Rev §§ 27A.6401-27A.6475) demonstrates that our Constitution and laws contemplate that the State can be bound even beyond existing appropriations *ex contractu* no less than *ex delicto*. See particularly MCLA § 600.6458, which provides for certification to the legislature of judgments against the State for the payment of which no appropriation has been made.

Stowell v. The Board of Supervisors for Jackson County, 57 Mich 31, makes it clear that the circuit judge does have authority to act contractually, and that the county is the proper arm of state government upon which the necessary expenses of operating the circuit court devolves. The authority of a judge to bind the county or the state is never broader than the necessity which prompts its exercise. Actual authority, not apparent authority is the criterion. Actual necessity must be alleged and shown by the claimant. Our re-affirmance of this ancient power will cause no rush to market by the judges. They are aware of the rule which makes an agent liable upon implied warranty of authority if his action exceeds his commission. Nor are vendors or employees likely to queue up for the prospect of litigating in the court of claims.

Fifth Issue: LAW CLERKS

Under appropriate factual circumstances, a circuit court may exercise its inherent power for the purpose of employing a law clerk or law clerks. On the basis of the record before us in this case we hold that there is no practical necessity at this time for additional law clerks in the third judicial circuit. Further, we do not decide whether the judges of the third circuit are empowered by statute to employ law clerks in the absence of an appropriation for that purpose. CLS 1961, §600.1471, Stat Ann 1962 Rev § 27A.1471.

As to superintendency of the judiciary, see Const 1963, art 6, § 4. We are not persuaded that the judge of the third circuit have demonstrated the practical necessity of employing law clerks at this time. And accordingly, we will direct them to withdraw their request for such clerks, reserving the administrative jurisdiction to redetermine the necessity at a later date.

Sixth Issue: THE JUDICIAL ASSISTANT

The question of the exercise of the inherent power of the judges of the third circuit to employ a judicial assistant is before us on this record. The court did in fact employ a judicial assistant, and fixed his salary at $25,000 per year. Irrespective of the statute on the subject (MCLA 600.1481, Stat Ann Rev 1962 § 27A.1481), we find that a judicial assistant of the type contemplated by the statute is a practical necessity for the effectively continuing operation of a metropolitan circuit court consisting of 27 judges, such as the third circuit.

Accordingly, we will remand this cause to the trial court for further proceedings as to this aspect of the action and to permit the affected party in interest to be joined as a plaintiff and to submit his claim for services for factual and final determination. In such remanded proceedings the judicial assistant will be the plaintiff and the circuit judge assigned to hear the matter will sit as in other causes.

Seventh Issue:

INHERENT POWER, PROBATION OFFICERS

On the record before us, we are not called upon to decide whether the circuit judge should exercise inherent power to employ additional probation officers. There is no doubt that in some circumstances a court should exercise inherent power to appoint a probation officer. By statute, MCLA § 771.14, Stat Ann 1954 Rev § 28.1144, a court is required to obtain the report of a probation officer before pronouncing sentence in certain cases. The courts cannot be prevented from proceeding to sentence by the absence of a probation officer, and direct contractual action by the judge would be warranted where necessary to the performance of his judicial duties.

On the other hand, we are not prepared to say that a court should exercise inherent power to take direct contractual action to augment the probation staff for the purpose of assuring a more adequate and effective ratio of supervisory officers to probationers.

The interest of the judiciary in the rehabilitative process is keen but not paramount. Corrections, pardons, and paroles are primarily the historic responsibility of the executive branch of government. And while such things are appropriately within the purview of a broad concept of the need of justice, they are not normally a part of the narrower notion of practical necessities of effectively continuing court functioning. The exigencies of a particular case may indeed dictate the appointment of a particular person to supervise a particular defendant. In such case, the inherent power of the court to act direcly may be called into play. But this is quite a different thing than the policy decision implicit in the establishment of supervisory ratios.

Eighth Issue: PROBATION OFFICERS STATUTORY POWER TO RECOMMEND

The paramount interest of the executive in the correctional process is recognized by the statute governing the appointment of probation officers, MCLA §771.7, Stat Ann 1969 Cum Supp § 28.1137. The function of the judge is merely to recommend. The power of appointment is retained in the executive branch and vested specifically in the corrections commission.

Unlike the statute governing law clerks and judicial assistants, MCLA § 771.7 makes no reference to appropriation. The phrase "and who shall receive such compensation as the boards of supervisors of the several coun-

ties shall provide" merely refers to the amount of salary established for the position and not the number of such probation officers. It is analogous to a statute governing employment of State employees who receive compensation "as provided by law."

It follows that the court may recommend the names of as many probation officers as it feels are necessary to maintain the appropriate level of supervision and investigation, and the corrections commission may appoint as many of that number as it determines are needed in accordance with its policies and standards, whereupon such employees shall receive the compensation established by the board of supervisors for assistant probation officers. Nor does MCLA § 771.12, Stat Ann 1954 Rev § 28.1142, negate this interpretation:

> "Sec. 12. The salary and necessary expenses of the chief probation officer and each assistant probation officer shall be paid monthly out of the treasury or treasuries of the county or counties composing the circuit within which such probation officer or officers shall act, where provision has been made by the board of supervisors of such county or counties for their payment; * * * "

This statute deals with the time, the source, and the method of payment. It does not imply that the salary and necessary expenses shall not be paid where no provision is made for their payment, but only that in such cases payment would not be made monthly.

That the law vests the corrections commission with plenary power to impose financial burdens upon the counties may be distressing to the appellants, but it is not novel. State mandated expenditures are familiar to county supervisors.

In *Stowell, supra,* we held:

> "* * * the expenses of justice are incurred for the benefit of the State, and only charged against the counties in accordace with the old usage, as a proper method of distributing the burden."

Ninth Issue: SERVICE GRANTS; VALIDITY OF WAYNE COUNTY EXCLUSION

It remains to consider whether the legislative design for financing probation services is a proper method of distributing the burden of this admittedly State responsibility.

The probation laws are an integral part of the administration of justice in the State of Michigan. Probation officers are appointed by the State executive authority acting through the corrections commission upon the recommendation of state officers, circuit judges. The work of supervising probationers is a state function. Jurisdiction is lodged in the department of corrections. MCLA § 791.204, Stat Ann 1954 Rev § 28.2274, provides:

> "Sec. 4. Subject to constitutional powers vested in the executive and judicial departments of the state, the department shall have exclusive jurisdiction over the following: (a) Probation officers of this state, and the administration of all orders of probation, * * * ."

Chapter 2 of Act 232, PA 1953, creates a bureau of probation within the department of corrections. Sections 25 and 26 of that Act are particularly noteworthy.

> "Sec. 25. Where the courts of more than 1 county are served by the same probation officer or officers,

the compensation of such officer or officers and the expenses of administering probation service within such counties shall be met jointly by the boards of supervisors therein: Provided, That when it shall appear to the commission that any county is unable to adequately maintain its probation program according to the standards set by the state bureau of probation, then service grants to such an extent and under such conditions as the commission may determine, may be made available to said county: Provided, That uniform rules to be followed in making available such service grants first shall be promulgated by the commission." MCLA § 791.225, Stat Ann 1954 Rev § 28.2295.

"Sec. 26. The provisions of this chapter shall not apply to probation departments heretofore established in any county of over 500,000 population, according to the latest or each succeeding federal decennial census." MCLA § 791.226, Stat Ann 1954 Rev § 28.2296.

Population as a measure of legislative classification has been considered by this Court many times. In *Mulloy v. Wayne County Board of Supervisors,* 246 Mich 632, at page 635, we held;

"If it is a reasonable and logical basis of classification, considering the subject of legislation, unquestionably a specified population may be made the test of the applicability of a general legislative act; and under such conditions the act will not be construed to be invalid as local legislation. *Hayes v. Auditor General,* 184 Mich 39. But where the subject of legislation is such that population has no obvious relation to the purpose sought to be accomplished, an attempt to make the application of the legislative act depen-

dent on population is unwarranted and amounts to local legislation. *Attorney General v. Lacy, 180 Mich 329.*"

PA 1953, No 232, is entitled,

" AN ACT to revise, consolidate and codify the laws relating to probationers and probation officers as herein defined, to pardons, reprieves, commutations and paroles, to the administration of penal institutions, correctional farms and probation recovery camps, to prison labor and prison industries, and the supervision and inspection of local jails and houses of correction; to create a state department of corrections, and to prescribe its powers and duties; to provide for the transfer to and vesting in said department of powers and duties vested by law in certain other state boards, commissions and officers, and to abolish certain boards, commissions and offices the powers and duties of which are hereby transferred; to prescribe penalties for the violation of the provisions of this act; and to repeal all acts and parts of acts inconsistent with the provisions of this act."

The purpose of this legislation is to discharge the State's responsibility for the correction and rehabilitation of criminals. If population has any obvious relation to this purpose, it would be that in the populous areas of the State there is a greater need for the commitment of the State's resources and the discharge of the State's responsibility to correct and rehabilitate criminals. In *Hayes v. Auditor General, supra,* we said at page 42:

"County agents, under the provisions of Act. No. 6 of the Public Acts of 1907 (Extra Session) (2 How. Stat [2d Ed.] §3458), are charged with numerous

> duties relating to the care, investigation, and supervision of dependent, neglected, and delinquent children. It is a well-known fact that the problem of dependency, neglect, and delinquency of children is practically limited to communities with congested population. * * * The legislature undoubtedly had in mind the fact that, on account of the number of cases, their complexity, and the added responsibility entailed thereby, the counties with congested population demanded the services and therefore the pay of an efficient, high-grade officer with more or less expert knowledge and training * * * ."

We can easily paraphrase what was said in *Hayes* by substituting "probation officer" for "county agent" and "convicted criminal" for "delinquent children." But we cannot reconcile the legislative intent considered in that case with the legislative scheme disclosed by section 26 and considered here.

To what permissible purpose does the Sente commit its resources to maintain an adequate probation program in every part of the State, except where it is needed most? By what logic is law and order deemed a local problem in one county and a state-wide problem in another?

The discriminatory thrust of section 26 is the more apparent when its classifying language is considered. In 1953, there was only one probation department "heretofore established" in a county of over 500,000 population, and no others could thereafter become "heretofore established" irrespective of any succeeding decennial census.[1]

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[1] Oakland County which passed the 500,000 mark in the 1960 census continued to receive grants until after this litigation was commenced.

Mulloy v. Wayne County Board of Supervisors, supra, at page 639, emphasizes that,

> "'The classification should be prospective, calculated to embrace any change in population or circumstances * * *.'"

and that the classification

> "'* * * must be so framed as to include in the class additional members as fast as they acquire the characteristics of the class.' *Bingham v. Board of Supervisors,* 127 Wis. 344 (106 N. W. 1071)."

Section 26 of Act 232, PA 1953, is unconstitutional as an invalid classification constituting local legislation in violation of Constitution 1963, article 4, § 29. The invalidity of section 26 does not by reason of MCLA §8.5, Stat Ann 1969 Rev § 2.216, affect the balance of the act.

Summary

We hold that:

Under our power to grant appropriate relief pursuant to GCR 1963, 865.1(7), we grant the following declaratory relief;

(a) The judges of the 3rd circuit may not employ additional law clerks at this time.

(b) The judges of the 3rd circuit may employ a judicial assistant, with duties as contemplated by MCLA § 600.1481.

(c) This cause shall be remanded to circuit court for substitution of parties plaintiff, permitting the judicial assistant heretofore employed by the judges to present his claim for services rendered.

(d) MCLA § 771.7 authorizes circuit judges to recommend persons for appointment as probation officers;

(e) MCLA § 771.7 authorizes the Michigan corrections commission to appoint probation officers upon the recommendation of circuit judges;

(f) probation officers appointed by the corrections commission entitled to receive the salary established by the board of supervisors for that position;

(g) MCLA § 791.226 purporting to exclude Wayne County from the provisions of PA 1953, No 232, is unconstitutional.

Remanded for entry of declaratory judgment in accordance with this Opinion. No costs, a public question being involved.

Harry F. Kelly, J.
Eugene F. Black, J.
Thomas G. Kavanagh, J.
Concurred with
Thomas E. Brennan, C. J.

APPENDIX E

AMENDED DECLARATORY JUDGMENT

At a session of said Court held at Detroit, Wayne County, Michigan, this 20th day of February, 1970.

Present: Honorable William John Beer, Circuit Judge.

The Michigan Supreme Court having heretofore entered its Opinion in this cause on December 8, 1969; and

The Supreme Court having declared that it had power to grant appropriate relief pursuant to GCR 1963, 865.1 (7); and The Supreme Court having further granted declaratory relief, as more particularly set forth in said Opinion, which Opinion in its entirety is incorporated

herein by reference, and the Supreme Court having further remanded this cause for entry of Declaratory Judgment in accordance with said Opinion and this Court being fully advised in the premises;

Now, Therefore, It Is Hereby Ordered and Adjudged that the Judgment heretofore entered in this cause on October 15, 1968, as amended by the Amendment of Judgment, dated November 27, 1968, be and the same is hereby vacated.

It Is Further Ordered and Adjudged that plaintiffs are entitled to the following declaratory relief, as set forth in said Opinion of the Supreme Court, and therefore this Court now Declares and Adjudges that:

1. The judges of the 3rd circuit may not employ additional law clerks at this time.

2. The judges of the 3rd circuit may employ a judicial assistant, with duties as contemplated by MCLA § 600.1481.[1]

3. MCLA §771.7[2] authorizes circuit judges to recommend persons for appointment as probation officers.

4. MCLA §771.7 authorizes the Michigan corrections commission to appoint probation officers upon the recommendation of circuit judges.

5. Probation officers appointed by the corrections commission are entitled to receive the salary established by the board of supervisors for that position.

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[1] Same as Mich. Statutes Annotated Sec. 27A.1481, Appendix H herein.

[2] Same as Mich. Statutes Annotated Sec. 28.1137, Appendix H herein.

6. MCLA §791.226[1] purporting to exclude Wayne County from the provisions of PA 1953, No. 232, is unconstiutional.

It Is Further Ordered and Adjudged that this Court shall retain continuing jurisdiction over this cause "for the purpose of assuring that the terms of the Supreme Court's Opinion, and of this Judgment, are complied with and implemented".

/s/ William John Beer,
Circuit Judge.

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[1] Same as Mich. Statutes Annotated Sec. 28.2296, Appendix H herein.

APPENDIX F

(State of Michigan—Supreme Court)

The Judges for the Third Judicial Circuit of the State of Michigan,
Plaintiffs-Appellees,
v.
County of Wayne and The Board of Supervisors of the County of Wayne Board of Auditors of Wayne County, Treasurer of Wayne County,
Defendants-Appellants.

No. 52,381

Before the Entire Bench

Black, J. (For affirmance in part in retention of jurisdiction) *dissenting.*

In the appellate opinion below (15 Mich App 713, 721, 722) Judge Levin has carefully collected what seems to be authority unanimous that a court, certainly one charged as this Court is with the preclusive responsibility for efficient all-over-the-State judicial service, receives and accepts with that responsibility the inherent power and duty to take such action as is reasonably necessary to fulfill the constitutional obligation thus undertaken. I agree with that authority, noting that it is fully consistent with the power and duty which Michigan's Constitution imposes upon her Supreme Court. Such power and duty probably transcends that which is imposed correspondingly by any of the other State Constitutions.

We need not repeat that the inherent power called up by this case must be cautiously exercised, or that it should pass every test of that guarded control which self-restraint exacts when there can be no review or appeal beyond impeachment, removal, or appeal to the people, say for a constitutional change or the defeat of some allegedly overactivistic Justice or Justices. All that is freely acknowledged, yet is beside the point.

The point indeed is sharp. Having declared openly the inherent power thus called into play, the essence of which is that the constitutionally assigned duty of a court such as ours automatically carries with it the power and responsibility of making continuantly sure that this "one court of justice" (Const 1908, art 6, § 1) functions serviceably as a co-equal branch of Michigan's government, we cannot without abdication avoid the instantly painful obligation of ascertainment of critical judicial needs and, if that ascertainment be affirmative (it is here indeed), of determining the reasonableness or unreasonableness of the monetary amount required to meet the urgency of the situation. Such a determination is due from this Court whether the amount involved is a comparative trifle,* or as here is an approximate $200,000 per year for payment of the salaries and expenses of additional probation officers, plus the other expenses of necessary judicial administration which Judge Levin has described in his opinion.

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* Such as the amount involved in *Stowell v. Board of Supervisors for Jackson County* (1885), 57 Mich 31. There the circuit judge, having "deemed it necessary to seclude the jurors from association with the public" during the trial of a murder case, arranged with the plaintiff hotelkeeper to board and lodge the jurors while the trial progressed. The board refused to pay the hotelkeeper's bill, whereupon he sought mandamus. The writ issued; Justice Campbell writing for a unanimous Court.

As for the facts, there is no dispute. The third circuit emergently requires the additional administrative help which in the trial court was adjudged. The reasonableness of the amounts asked for by the Wayne judges to provide such help is not contested, nor could it be. All such questions were settled by proof or formal concession, leaving only the real defense; that the defendant county simply hasn't sufficient money to meet all demands upon the county treasury and that it has the exclusive power to determine and allocate where its available funds should go. That defense is simply that the judicial system of Michigan lacks the power to create valid charges upon funds of the county. It was rejected in the *Stowell Case, supra,* and we should reject it now.

Justice Campbell wrote, in *Stowell*, at 33, 34:

> "It is within the legislative power to arrange specifically how all these matters should be disposed of; but as the law now stands, the inherent power and duty of courts to exercise their functions must authorize such action as becomes expedient in the course of judicial business."

Then came the concluding paragraphs of his opinion, paragraphs I deem directly applicable here. (pp. 24, 35):

> "Of the power of courts to incur similar expenses generally for court exigencies, so as to bind the county, without statute, the authorities are quite clear. *People v. Stout,* 23 Barb. 349; *McCalmont v. Allegheny Co.,* 29 Penn St. 417; *Supervisors of Crawford County v. LeClerc* 4 Chand. 56; *White v. Polk Co.,* 17 Iowa 413.
>
> "Our own decisions have always held that while the supervisors are, under the Constitution, exclusive judges of the propriety of services for the county,

> yet they have no such exclusive power over those county charges that are not for such services, and we have also held that the expenses of justice are incurred for the benefit of the State, and only charged against the counties in accordance with old usage, as a proper method of distributing the burden. *People v. Auditors of Wayne Co.* 13 Mich. 233. Also cases in note to *Kennedy v. Gies* 25 Mich. 83 (annotated ed). Any other rule would put it in the power of a board of supervisors to prevent courts from exercising their proper functions. In my opinion the supervisors were bound to audit this account.
>
> "Mandamus must issue as prayed, without costs."*

This record is more than persuasive that the probationary needs of the third circuit are critically pressing; that probation is failing there for want of regular person-to-person attention to probationers by a sufficient number of trained probation officers, and that the necessity for an even greater number of such officers than was originally pleaded has mounted since the institution of this litigation. The record is replete with overwhelming proof, not just of expert opinion but of signal success of the already tried Saginaw pilot project, that adequately supervised probation accomplishes a record of rehabilitation which more or longer prison sentences simply cannot duplicate. The proof also tends to establish, without dispute by any wit-

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* The opinion proposed for reversal in one hand and the *Stowell* opinion in the other, one is led to wonder what the holdback members of this Court will do should some board of supervisors—fed up as most are with the mounting public cost of free criminal appeals, transcripts, etc.—refuse to honor one of the many drafts our judicial system draws weekly on county treasuries. Would that be the kind of case which is inappropriate "for the exercise of the inherent power of the courts"? Or would we fall supinely back upon a duty defined by legislation, in lieu of our constitutional duty?

ness or traverse by the defendants, that improved probationary supervision, costly as it is, involves a considerably lessened expenditure of public funds than the only other alternative. That alternative is more and more prison sentences, more and more prisons to be constructed and maintained, more and more guards and prison personnel to be hired, more and more failure of rehabilitation of the adjudged criminal.

The real issue here is not the sufficiency of proof of extreme need, or of carefully ascertained moderation of the amount involved. That has been settled of record and fortified by our own knowledge begotten of some little familiarity, as general superintendent, with the administration of criminal justice in the third circuit.

The primary issue instead is whether this Court should affirm the circuit court's determination of duty of the defendants to budget and pay. I would so affirm yet, out of that respect which the judicial branch owes to the evident honest belief of the defendant public officers in the total exclusivity of the fiscal powers that are vested in them by law, submit that we should withhold issuance of any peremptory process so as to provide fair opportunity for study by the defendants of our decision and determination—as constitutional compeers may rightfully and hopefully expect of each other—to voluntarily comply with the monetary requests of the courts below have upheld. Here I would follow the lead of the Supreme Court in *Commonwealth of Virginia v. State of West Virginia* (1918), 246 US 565, 604. There the Court had before it the issue of enforced payment, by West Virginia to Virginia, of the judgment which the Court had entered in favor of one against the other in the sum of $12,393,929.50.*

* The judgment appears in full, 246 US at 568. For the background of this case, going back to the admission of West Virginia to the Union in 1863, see *Virginia v. West Virginia* (1907), 206 US 290.

The Court posed and then discussed today's question at length (pp 600-606): "What are the appropriate remedies for such enforcement?" The discussion is of historic as well as precedential interest. It included consideration, but expressly omitted decision, of this Court-raised issue; whether "there is power to direct the levy of a tax adequate to pay the judgment and provide for its enforcement irrespective of state agencies." (p. 604). The decision finally reached was that of restoration of the case to the Court's docket for the purposes set forth in the concluding paragraph of the Court's opinion (pp. 605,606). That was done upon the hopeful and ultimately prosperous premise that, "if we refrain now from passing upon the questions stated, we may be spared in the future the necessity of exerting compulsory power against one of the States of the Union to compel it to discharge a plain duty resting upon it under the Constitution." (p. 604).*

I vote for what to me is a due holding that the defendants are under legal duty to budget and pay as ordered in circuit, but to retain jurisdiction for further proceedings if necessary, including such as may arise upon the plaintiffs' pending request for determination and payment of counsel fees and expenses.

John R. Dethmers, J.
Concurred with
Eugene F. Black, J.

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* The clerk of the United States Supreme Court advises that the Court's Journal contains this entry under date of March 1, 1920:

"No. 2, Original. *Commonwealth of Virginia*, complainant, *v. State of West Virginia.* Acknowledgement of satisfaction of decree of this court of June 14, 1915, in favor of complainant presented, and ordered filed."

For an interesting discussion of *Virginia v. West Virginia*, and of the power of the court to compel payment, see Chief Justice Charles Evans Hughes' "The Supreme Court of the United States" (1928), pp 126-129.

Supplement (December 5, 1969):

Since the foregoing views were submitted to the other Justices, the Chief Justice has contributed his opinion. It stands for reversal and remand for entry of a declaratory judgment, summarized by subparagraphs (a) through (g) thereof appearing ante at pp. 14-15 of Brennan's opinion memo.

Adhering to my firmer-by-the-day conviction that this constitutionally responsible superintendent of Michigan's one court of justice should record a long since overdue holding that the defendants are under legal duty to budget and pay as ordered in circuit, and simply to attain an affirmative determination—if at all possible now—in lieu of our present paralysis of decision, I have endorsed the opinion of the Chief Justice. I have done so with some little reluctance, being of opinion that assignments of oath-bound duty, made by self-executing constitutional provisions, require no aid or analysis of statutory provisions.

There is highly respectable precedent for concurrence of such nature. Both in *Time v. Hill* (1967), 385 US 374, 398, 87 S Ct 534, 17 L ed 2d 456 and *Curtis Publishing Co. v. Butts* (1967) 388 US 130, 170, 87 S Ct 1975, 18 L ed 2d 1094, Mr. Justice Black, "in order for the court to be able at this time to agree on an opinion in this important case based on the prevailing constitutional doctrine," entered his successive concurrences without receding "from any of the views I have previously expressed."

APPENDIX G

DENIAL OF MOTIONS OF REHEARING

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the ninth day of November in the year of our Lord one thousand nine hundred and seventy-one.

Present: the Honorable Thomas M. Kavanagh, Chief Justice, Eugene F. Black, Paul L. Adams, Thomas E. Brennan, Thomas G. Kavanagh, John B. Swainson, G. Mennen Williams, Associate Justices.

Motions for rehearing having been heretofore submitted herein by defendants, and due consideration having been had by the Court, It is ordered that the motions be and they are hereby denied.

Adams and Brennan, JJ., dissent.

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 11th day of November, in the year of our Lord one thousand nine hundred and seventy-one.

Donald F. Winters,
Clerk.

ADMINISTRATIVE ORDER

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the ninth day of November, in the year of our Lord one thousand nine hundred and seventy-one.

Present: the Honorable Thomas M. Kavanagh, Chief Justice, Eugene F. Black, Paul L. Adams, Thomas E. Brennan, Thomas G. Kavanagh, John B. Swainson, G. Mennen Williams, Associate Justices.

As provided by the opinion of this Court in the case of Judges of the Third Judicial Circuit of Michigan v. County of Wayne, et al., No. 52381, it is ordered that no judge of a subordinate court may hereafter, by peremptory writ or otherwise, order the expenditure of public funds for any judicially required purpose until such judge has submitted his proposed writ or order to the constitutional office of Court Administrator (Const 1963, Art 6, §3), and has obtained due approval thereof by that office. This restraint shall not apply to orders for payment of trial or appellate costs in cases where same are due for entry on behalf of indigent defendants accused or convicted of felony.

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 11th day of November in the year of our Lord one thousand nine hundred and seventy-one.

Donald F. Winters,
Clerk.

APPENDIX H

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States:

ARTICLE I

Grant of legislative power. Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

* * *

ARTICLE II.

Executive power; term of president. Section 1. The executive Power shall be vested in a President of the United States of America. . . . .

ARTICLE III

Judicial power; judges, term, compensation. Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . . .

ARTICLE IV

Republican form of government guaranteed; protection from invasion and domestic violence. Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, ...

Amendments to U. S. Constitution

ARTICLE XIV

Citizenship, security of persons and property, due process and equal protection clauses. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Michigan Constitution of 1963:

ARTICLE I

Self-incrimination; due process of law; fair treatment at investigations. Sec. 17. No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. . . .

ARTICLE III

Separation of powers of government. Sec. 2. The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

ARTICLE VII

Legislative, administrative, and other powers and duties of boards. Sec. 8. Boards of supervisors shall have legislative, administrative and such other powers and duties as provided by law.

Michigan Statutes Annotated:

SEC. 5.331 (POWER OF SUPERVISORS)

• • •

Salaries; claims] Ninth, To prescribe and fix the salaries and compensation of all employees of their respective counties where not fixed by law, . . . ;

• • •

Business management.] Sixteenth, To represent their respective counties and to have the care and management of the property and business of the county in all cases where no other provisions shall be made:

Same; rules and regulations; claims; removal of officers.] Seventeenth, To establish such rules and regulations in reference to the management of the interest and business concerns of such county, and in reference to the mode of proceeding before such board, as they shall deem necessary and proper in all matters not especially provided for in this act or in some law of this state: . . . .

SEC. 5.1191(12) (f)

(POWERS AND DUTIES OF COUNTY CIVIL SERVICE COMMISSION UNDER COUNTY CIVIL SERVICE LAW)

* * *

The classification[1] shall be subdivided into groups and shall be based upon, and graded according to the duties and responsibilties of such positions, and shall be so arranged as to permit the filling of the higher grades through promotion. All salaries shall be uniform for like service in each grade of the classified service as the same shall be classified and standardized by the commission. Such classification and standardization of salaries shall not be final until approved by the board of supervisors, and such salaries shall not be paid except in accordance with such classification and standardization; * * *

[1] The classification recited herein pertains to County employees under classified civil service, from which the judicial assistant, law clerks and probation officers, the employees involved in this litigation, are specifically exempt.

SEC. 27A.1471 (JUDICIAL SYSTEM)

(1) The circuit courts and superior courts may employ law clerks for the court or for each judge of such courts. . . .

• • •

(3) The compensation of the law clerks shall be fixed by the judges of the court within the sum appropriated therefor by the legislative body or bodies of the governmental unit or units, other than the state of Michigan, which pays the compensation of such judges. . . .

SEC. 27A.1481 (JUDICIAL SYSTEM)

(1) In every state court of record in Michigan inferior to the supreme court which now has, and in any such court which may hereafter have, 10 or more judges, such judges may appoint an attorney to serve as judicial assistant to their court, ...

• • •

(3) The compensation of the judicial assistant shall be fixed by the recommending judges within the sum appropriated therefor by the legislative body of the governmental unit, other than the state of Michigan, which pays the compensation of such judges. . . .

SEC. 28.1137

(CODE OF CRIMINAL PROCEDURE)

Sec. 7. The circuit court of each of the several judicial circuits may recommend a chief probation officer, may also recommend assistant probation officers who may be appointed by the Michigan corrections commission, each of whom shall act as such probation officer in the judicial circuit in which or the probation district to which he shall

have been appointed, and who shall receive such compensation as the boards of supervisors of the several counties shall provide. . . .

SEC. 28.2295

(ADMINISTRATION OF COUNTY PROBATION PROGRAMS BY STATE CORRECTION COMMISSION)

Sec. 25. . . . . That when it shall appear to the commission that any county is unable to adequately maintain its probation program according to the standards set by the state bureau of probation, then service grants to such an extent and under such conditions as the commission may determine may be made available to said county: Provided, That uniform rules to be followed in making available such service grants first shall be promulgated by the commission.

SEC. 28.2296

(ADMINISTRATION OF COUNTY PROBATION PROGRAMS BY STATE CORRECTION COMMISSION [*Continued*])

Sec. 26. The provisions of this chapter shall not apply to probation departments heretofore established in any county of over 500,000 population, according to the latest or each succeeding federal decennial census.

APPENDIX I

(State of Michigan—Supreme Court)

The Judges for the Third Judicial Circuit of the State of Michigan,
Plaintiffs-Appellees,
v.
County of Wayne and the Board of Supervisors of the County of Wayne, Board of Auditors of Wayne County, Treasurer of Wayne County,
Defendants-Appellants.

Before the Entire Bench
Adams, J., Dissenting

I. *Constitutional Provisions*

Section 2 of article 3 of the 1963 Michigan Constitution provides:

> "The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."

Section 1 of article 4 of the 1963 Michigan Constitution provides:

> "The legislative power of the State of Michigan is vested in a senate and a house of representatives."

The power to appropriate money is specifically set forth as a legislative power in sections 30 and 31 of article 4.

Section 8 of article 7 provides:

"Boards of supervisors shall have legislative, adimnistrative and such other powers and duties as provided by law."

Section 1 of article 6 of the 1963 Constitution sets forth the judicial power as follows:

> "The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house."

It was said in *Leahey, et al v. Farrell, et al* (1949), 362 Pa 52, 66 A Rep 2d 577 (p 578):

> "Article V, Section 1 of the Constitution of Pennsylvania, P. S., relates to the judicial power and reads: 'The *judicial power* of this Commonwealth shall be vested in a Supreme Court, in courts of common pleas, courts of oyer and terminer and general jail delivery, courts of quarter sessions of the peace, orphans' courts, magistrates' courts, and in such other courts as the General Assembly may from time to time establish.' (Italics supplied). The *fiscal power* is vested in the legislature by Article IX of the Constitution. These are coordinate powers which must be construed to work harmoniously."

II. *The Inherent Power of the Courts*

The above provisions of the 1963 Michigan Constitution recognize two fundamental aspects of a government that operates in accordance with the doctrine of separation of powers: 1) the power to appropriate funds for operations of government (popularly known as the power of the purse) is lodged in the legislative branch of the government, and 2) the judicial power with all that is inherent in that power is lodged in one court of justice.

The first question to be considered is whether the inherent power of the courts is such as to permit the writ of mandamus to issue. There have been various definitions and discussions of inherent power. Some of these are as follows:

20 Am Jur 2d, Courts, § 79, pp, 440, 441, states:

> "Courts have inherent power to do all things that are reasonably necessary for the administration of justice within the scope of their jurisdiction. It has been said that courts have inherent power to summon witnesses and compel their appearance in court, to administer oaths, to issue or to honor letters rogatory, to prevent abuse of process, to provide counsel for the indigent, to have errors in the records corrected, to relieve a party in default, to discipline attorneys at law, to take appropriate action in cases of contempt, and to do various other things to maintain order and to function properly as a court."

> "The term 'inherent power of the judiciary' means that which is essential to the existence, dignity and functions of the court from the very fact that it is a court." *In re Integration of Nebraska State Bar Association,* 133 Neb 283, 275 NW 265, 266.

"That courts have inherent power to do all things that are reasonably necessary for the proper administration of their office within the scope of their jurisdiction is a well-settled principle of law." *In re Surcharge of County Commissioners* (1929), 12 Pa D & C Repts 471, 475.

As was noted in the above cited case, the inherent power has been used and expense incurred (a) to feed and lodge jurors, (b) for attendance of physicians upon persons who become ill while impaneled, (c) for the transportation of jurors to the *locus in quo* of a matter in controversy, (d) for appointment of custodians of ballot boxes after elections, (e) for the appointment of bodyguards to protect judges from violence in the performance of their duties, (f) for court interpreters, (g) and for office furnishings, law books, and so on.

The inherent power of the courts is undoubtedly one of almost unlimited application since the courts themselves are the ones to say what that power is but the use of inherent power has been and should be exercised with utmost caution. This is particularly true if the use of inherent power will conflict with the legislative power to appropriate.

It was said in *Leahey, et al v. Farrell, et al* (1949), 362 Pa 52, 66 A Rep 2d 577 (p. 579):

"Control of state *finances* rests with the legislature, subject only to constitutional limitations: Commonwealth ex rel. Schnader v. Liveright, Secretary of Welfare et al., 308 Pa 35, 161 A 697. The function of the judiciary to administer justice does not include the power to levy taxes in order to defray the necessary expenses in connection therewith. It is the legis-

lature which must supply such funds. Under the system of division of governmental powers it frequently happens that the functions of one branch may overlap another. But the successful and efficient administration of government *assumes* that each branch will co-operate with the others." [Emphasis by the court.]

In the case of *State ex rel Hillis v. Sullivan* (1913), 48 Mont 320, 137 P 392, the Court said (p 395):

> "*The very conception of inherent power* [*in the Court*] *carries with it the implication that its use is for occasions not provided for by established methods.* When we say that it is primarily the duty and right of the sheriff, either in person or by deputy, to perform all the duties for which an attendant upon the district court may be had at public expense, that if additional attendants are required the county through its board of commissioners shall furnish them, that if the county fail in that regard the court may procure them through the sheriff, we express the normal situation, the orderly method which must be observed so long as it is adequate in results. *When, however, these methods fail and the court shall determine that by observing them the assistance necessary for the due and effective exercise of its own functions cannot be had, or when an emergency arises which the established methods cannot or do not instantly meet, then and not until then does occasion arise for the exercise of the inherent power.* (citations omitted.)" [Emphasis by the Court.]

I would use the inherent power of the courts only in those cases where it is essential to assure the continued existence or basic functioning of the courts. The test I

would apply would be the ability of a court to operate as a court, not whether the court can operate more conveniently or expeditiously if it has some additional means to carry out its functions. For example, a court stenographer is essential for the proper functioning of a court of record. If one were not provided, a court of record under its inherent power could supply one and compel the payment of an adequate salary.

I cannot agree, however, that the law clerks, probationary officers or a judicial assistant are so essential to the operation of the circuit court of Wayne county as to be a proper case for invoking the doctrine of inherent power of the courts. I agree that the courts would operate more efficiently if the judges were provided with law clerks, if the judges had adequate probation services, and if the court had a judicial assistant. In the case of probation officers, I would concede that the question is indeed a close one. But a line must be drawn and, as I have indicated, I would draw it narrowly. I am convinced that the courts will continue to function even if they are not provided with tsese services. The cost is not insignificant—at least $200,000 per year. Consequently, this case involves a direct confrontation between the inherent judicial power of the courts and the legislative power to make appropriations. One or the other must give. Under our theory of government, the legislature or a subordinate legislative body has the power to appropriate for all branches of government. Both the executive and judicial branches are required to present their fiscal needs to the legislative branch for consideration by that branch and allocation of available funds to all three branches of government based upon a legislative decision. This is the process that should be followed here.

III. *Statutory Authorization*

There remains for consideration the extent of statutory authorization, if any. There may be an authorization resulting from statutory enactments. If so, the court proceeds under the statutory authority and not in the exercise of inherent power.

Judge Levin in writing for the Court of Appeals undertook to uphold the claims of the judges of the Third Judicial Circuit on the basis of statutory authorization. (15 Mich App 713). For the employment of law clerks and a judicial assistant, he relied on the Revised Judicature Act, §§ 1471 and 1481, respectively. MCLA § 600.1471; Stat Ann 1962 Rev § 27A.1471; MCLA § 600.1481, Stat Ann 1962 Rev § 27A.1481. He found the power to determine the county's needs for probation officers and to require appropriation of funds to be vested in the circuit judges by virtue of the provisions contained in sections 7 and 12, chapter 11 of the Code of Criminal Procedure. MCLA §§ 771.7 and 771.12, Stat Ann 1969 Cum Supp § 28.1137 and Stat Ann 1954 Rev § 28.1142.

The statute relating to law clerks (§ 1471) is permissive as to employment saying only that "circuit courts * * * may employ law clerks" but imposes restrictive condition on residence and pay in these words: "Each law clerk shall be a resident of the state of Michigan," and "The compensation of the law clerks shall be fixed by the judges of the Court *within the sum appropriated therefor by the legislative body* or bodies of the governmental unit or units, other than the state of Michigan, which pays the compensation of such judges." (Emphasis added.) Section 1481 contains no requirement that a judicial assistant be a resident of the State but does require him to be licensed to practice in all courts of the State of Michigan

and in the Supreme Court of the United States with at least 5 years of active practice. Under the statute, "compensation of the judicial assistant shall be fixed by the recommending judges *within the sum appropriated therefor by the legislative body of the governmental unit; other than the state of Michigan, which pays the compensation of such judges.*" (Emphasis added.)

Judge Levin seeks to avoid the restriction appearing in the foregoing sections upon the payment of compensation only from appropriated funds by saying: "Having in mind the financial circumstances of most counties of this State, we do not think the legislature mean to vest in the county boards of supervisors the discretion to determine whether the legislation regarding probation officers, law clerks and a judicial assistant would be implemented." To this it might be said, having in mind the financial problems of most counties, it must be doubted that the legislature intended to add to their financial woes, especially in view of the language employed by the legislature in the statute.

The case of *Sturgis v. County of Allegan* (1955), 343 Mich 209, is cited, with comment, to support the above quoted conclusion of Judge Levin. An examination of the statutory language under consideration in that case will disclose that it did not impose a compensation restriction on the employing authorities. The provision read: "That part of the compensation of the county superintendent of schools as is paid from county funds [plus other items] shall be paid by the county treasurer after the same have been authorized by the county board of education from such amounts as may be appropriated therefor by the county board of supervisors."

With regard to the Wayne circuit judges' claim for more probation officers, the Court of Appeals adopted

similar reasoning to that applied to law clerks and a judicial assistant. It said:

> "In our opinion sections 7 and 12, ch 11, of the code of criminal procedure also evidence a legislative purpose to vest in circuit judges, not the board of supervisors, the power to determine the county's needs for probation officers, to cause such supporting personnel to be hired, to fix their compensation and, if need be, to direct the legislative body to appropriate the required funds."

In a footnote at the same page, this appears:

> "At the time of oral argument before our Court we suggested to counsel that the construction of RJA §§ 1471 and 1481 adopted by the trial judge, namely, that the legislature conferred upon the Wayne circuit court the power to hire and fix the salaries of law clerks and a judicial assistant and to direct the payment of their salaries, might as well be the correct interpretation of sections 7 and 12 of the code of criminal procedure concerning the appointment of probation officers."

To the extent pertinent, the section 7 and 12 provisions are:

> "Sec. 7. The circuit court * * * *may also recommend assistant probation officers* who may be appointed by the Michigan corrections commission * * * and who shall receive such compensation as the boards of supervisors of the several counties shall provide. (Emphasis added.)
>
> "Sec. 12. The salary * * * of * * * each assistant probation officer shall be paid monthly out of the treasury or treasuries of the county or counties com-

posing the circuit within which such probation officer or officers shall act, *where provision has been made by the board of supervisors of such county or counties for their payment;* * * *." (Emphasis added.)

These statutes do not empower the circuit court to employ anybody or to fix compensation. The court can recommend appointment and no more.

In my view, the Court of Appeals has confused the implementation of inherent power with the exercise of statutory authority. Inherent power, when it is present, needs no statutory implementation. But where a court is proceeding under a statute, it is bound by the statute's terms and conditions. The action taken must conform to the statute and may not be in derogation of that part of the statute which imposes restrictive conditions. Because the court proceeds under the statute, there is no legislative encroachment upon the inherent power of the judiciary.

IV. *Summary*

In summary: (1) This case is not an appropriate one for the exercise of the inherent power of the courts. It does not involve basic needs for the performance of the judicial function and does involve a direct confrontation with the legislative power; (2) none of the statutes under consideration contain an authorization which permits the courts to proceed solely upon their own authority without legislative appropriation of the necessary funds.

I vote to reverse the Court of Appeals and the trial court. I would dismiss the action of the Wayne County Judges with prejudice. No costs, a public question being involved.

Thomas M. Kavanagh, J.
Concurred with
Paul L. Adams, J.

APPENDIX J

(State of Michigan—Supreme Court)

The Judges for the Third Judicial Circuit of the State of Michigan, Plaintiffs-Appellees, v. County of Wayne and The Board of Supervisors of the County of Wayne, Board of Auditors of Wayne County, Treasurer of Wayne County, Defendants-Appellants.	No. 52,381

Before the Entire Bench.

Adams, J. (dissenting)

I agree with Justice Brennan that much of the problem stems from the existing hodge-podge of statutes dealing with court personnel. A major legislative overhaul is indicated. Failing such, the courts, and this Court in particular, should assume control of all court personnel in accordance with the inherent judicial power lodged in one court of justice.

I agree with Justice Brennan that the circuit court is the public employer of its employees with authority to act in accordance with MCLA § 423.201 *et seq.* (Stat Ann 1968 Rev § 17.455(1) *et seq.)*. That act provides that a public employer shall bargain collectively with the representatives of its employees. However, I do not find anything in that act dealing wth the appropriation of funds to pay employees or that would authorize an action of mandamus

to compel payment. In determining whether such a writ should issue, I would apply the standard for the use of the inherent power of the courts of which I wrote in 383 Mich 10, at page 43.[1]

The danger of the issuance of such a writ to force payment of compensation "of all employees of the circuit court established by the law or needed in the operation of the circuit court" is that it disregards the realities of a county's financial resources.

The problem is cogently stated in the concurring opinion of Justice Jones in *Commonwealth ex rel. Carroll v. Tate* (1971), 442 Pa 45, 58-59 (274 A2d 193), in which case he wrote:

> "While I concur in the result achieved by the majority, I must note my disagreement with the precedent thereby established.
>
> "At first glance, the majority's statement—'the deplorable financial conditions in Philadelphia must yield to the Constitutional mandate that the Judiciary shall be free and independent and able to provide an efficient and effective system of Justice' —would appear most commendable. Stated differently, the majority essentially holds that whatever amount is 'reasonably necessary' for judicial administration must be awarded *even though the City may have no available funds*. With this proposition I cannot agree; in my opinion, the computation of a 'reasonably necessary' amount must consider the financial resources available to the city. However, the record demonstrates that these additional funds have already been set aside and that the city of Philadelphia will not

[1] Also 172 N.W. 2d 450-451.

be forced into 'involuntary bankruptcy.' It is for this fact that I am able to concur.

"The majority fails to realize the full import of its standard. If this Court holds that funds must be afforded the Judiciary if 'reasonably necessary,' could a future majority, while stressing the fundamental co-equality of all three branches of government, logically deny this same standard to the Executive branch of government (the Legisaltive branch already controlling the power of the purse)? Unless that majority is prepared to nominate the Judiciary for a *primus inter pares* status, this question must be answered in the negative. Although the Executive, unlike the Judiciary, is ofttimes able to resolve these difficulties in the political arena, I would be most reluctant to rely on the mercurial world of politics as the Executive's only recourse.

"Predictably, a future City Council could then be swamped by 'reasonably necessary' requests from the Police Department, Sanitation Department, Recreation Department and all other departments of the Executive branch. Unquestionably more money would enable each of these departments to better serve the community. However, the sum of these 'reasonably necessary' requests may very well, in some future instance, exceed a municipality's available revenue resources. Projecting the present majority's original premise and *realizing all three branches operate in an imperfect* world, I must take issue with the majority's overly optimistic precedent.

"Certainly taxes could be increased to cover any impending deficit. Certainly those of us in the Judicial branch of government must zealously defend our in-

dependence. Perhaps my prediction is a bit too gloomy. However, I would all to eagerly embrace the majority if only it would recognize that what is 'reasonably necessary' cannot fail to consider the financial plight of the city."

In the absence of a showing that employees are essential to assure the existence or basic functioning of the court, I vote to deny the writ.

Paul L. Adams

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-8431

THE JUDGES FOR THE THIRD JUDICIAL CIRCUIT OF THE STATE OF MICHIGAN,
Plaintiffs-Appellees,
vs.
COUNTY OF WAYNE and THE BOARD OF SUPERVISORS OF THE COUNTY OF WAYNE, BOARD OF AUDITORS OF WAYNE COUNTY, TREASURER OF WAYNE COUNTY,
Defendants-Appellants.

Michigan Supreme Court No. 52,381

AMICUS CURIAE BRIEF OF KENT COUNTY, MICHIGAN, IN SUPPORT OF APPLICATION OF WAYNE COUNTY FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. ---------

THE JUDGES FOR THE THIRD JUDICIAL CIRCUIT OF THE STATE OF MICHIGAN,
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vs.
COUNTY OF WAYNE and THE BOARD OF SUPERVISORS OF THE COUNTY OF WAYNE, BOARD OF AUDITORS OF WAYNE COUNTY, TREASURER OF WAYNE COUNTY,
Defendants-Appellants.

Michigan Supreme Court No. 52,381

AMICUS CURIAE BRIEF OF KENT COUNTY, MICHIGAN, IN SUPPORT OF APPLICATION OF WAYNE COUNTY FOR WRIT OF CERTIORARI

INTRODUCTION

Kent County is one of the 83 counties in Michigan. It has an interest in the instant matter and will be adversely affected if the opinion of the Michigan Supreme Court is not reversed by this court.

MISNOMER OF CASE

This case is entitled as on the frontispiece. It is a misnomer. The real plaintiff is the Supreme Court of Michigan. The real defendant is the Constitution. The Supreme Court of Michigan was the judge. The Constitution lost.

THE SUPREME COURT OF MICHIGAN IS EXERCISING THE ROYAL PREROGATIVE OF JAMES I AND CHARLES I, AND, THEREFORE, DENIES TO THE STATE OF MICHIGAN A REPUBLICAN FORM OF GOVERNMENT

"To judge all and to be judged by none." This is the essence of the royal prerogative. This was the precise language addressed to the Parliament of Great Britain in 1608 by King James. We do not claim that the Federal Constitution guarantees to the states the traditional separation of powers. We do say that the Federal Constitution prohibits a state or an agency thereof from exercising the royal prerogative.

The Supreme Court of Michigan now asserts that it has the power "to judge all and to be judged by none." It claims in effect that it must have first call on the budgets and appropriations of the counties of Michigan.

In the case at bar, these extra amounts needed for Wayne County alone rose from $200,000.00 in 1968 to an estimated $2,600,000.00 in 1971. Experience of bureaucracies, judicial or otherwise, portends geometric additions each year until the "requirements" of the judiciary will consume the entire revenues of the counties of Michigan. There is no provision for any relief from a judicially determined "requirement." The counties are required to budget, appropriate and tax at the pleasure of the Michigan judiciary. (in reality the Supreme Court of Michigan). How then does this differ from the assertions of James I or Charles I?

They, too, asserted they had the right to order the Parliament to appropriate and tax such sums as they, the sovereigns, determined to be "necessary." Thus, Charles to the Parliament of 1628 said he must have:

> "such supply as to secure ourselves and save our friends from imminent ruin . . . Every man must now do according to his conscience, wherefore if you (which God forbid) should not do your duties in contributing

> what this State at this time needs I must . . . use those other means which God hath put into my hands to save that which the follies of other men may otherwise hazzard to lose. Take not this as threatening, for I scorn to threaten any but my equals, . . . but as an admonition."

Paraphrasing: The King said to the Parliament that it had the duty to pay him such sums as he saw fit to carry on his duties as he saw them and that it was not his business to worry over where or how the sums were "appropriated and budgeted." It was against these concepts that Sir Edward Coke in the Parliament of 1608-1610 and while sitting as the chief justice of the Court of Common Pleas told King James: "When an act of Parliament is against common right and reason, the common law will control it and adjudge such action to be void." The common law was above the Parliament. The common law was above the king. See *Bonham's case*, Coke 8 Rep. 116-121, (1610). Bonham also laid down the proposition which has since been accepted by all the common law countries of the world that no man should be a judge and a party to a suit. Yet, in this case as we have seen, the Supreme Court of Michigan is the plaintiff and the Supreme Court of Michigan is the judge.

DENIAL OF THE GREAT WRIT

But even worse: Suppose a county should refuse to appropriate and budget all that the Supreme Court of Michigan decided was "necessary." Bench warrants will be issued and several county commissioners committed to the common jail until they relent and do that which the court has commanded. And is that not exactly what King Charles did in 1626? See *Darnel's case* 3 State Trials, 1-169 (popularly known as the Case of the Five Knights), (1627-1628). Habeas corpus was denied the five knights. Habeas corpus will be denied the county commissioners because they will be imprisoned by the one state agency — the judiciary — that has the power to grant the writ.

Not only will the great writ runneth not, there will be no writ at all. Those words of Sec. 39 of the Magna Carta, the touchstone of our liberties and of our political heritage, will become meaningless and negated.

> "No freeman shall be taken or imprisoned, or disseised, or outlawed, or banished, or any ways destroyed, nor will we pass upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land."

NO WRIT ~~AT~~ ALL!

These words must be anathema to a free society. They are intolerable in a political democracy. Unless this court act, the great guaranties of Magna Carta and of our own Constitution will be lost.

The thrust of this case, the gravamen of this case is that a Republican form of government and unlimited and unchecked monarchial powers are inconsistent. If the Supreme Court of Michigan can claim and exercise the royal prerogative, the people of Michigan can have no Republican form of government. One need not wear the crown and bear the scepter to be a monarch. A black robe will suffice.

APOLOGIA

We do not deny that the judiciary of Michigan, indeed the courts of all the states and of the United States are facing serious problems with respect to the equal administration of justice. In many cases, the judiciary has been the financial stepchild of the legislatures and the Congress. If the courts are to continue to receive the respect of the people whom they serve, improvements in the administration of justice will have to be made. This will undoubtedly mean the appropriation of larger sums so that the courts may be properly staffed to carry out their constitutional functions. But to attain that goal by

destroying our basic liberties is akin to throwing the baby out with the bath water.

CONCLUSION

Since at least 1301 in the reign of King Edward I, kings and parliaments have used the excuse of "urgent necessity," "practicably necessary," "reasonably necessary," and even just "necessary" to justify actions contrary to the common law. As late as 1964, the Congress of the United States gave to the Executive the power to authorize and execute "to take all necessary steps in Southeast Asia." This was the Gulf of Tonkin Resolution. When courts or parliaments or presidents or kings use the words of "necessity," they have throughout our long history been words of great evil. Who indeed shall guard the guards?

RELIEF SOUGHT

That a writ of certiorari be granted and that this court hear this case upon the merits.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

TERM OF OCTOBER, 1971

No. 71-843

COUNTY OF WAYNE and THE BOARD OF SUPERVISORS OF THE COUNTY OF WAYNE, BOARD OF AUDITORS OF WAYNE COUNTY, TREASURER OF WAYNE COUNTY,
Petitioners-Defendants,

v.

JUDGES FOR THE THIRD JUDICIAL CIRCUIT OF THE STATE OF MICHIGAN
Respondents-Plaintiffs.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT

The Judges for the Third Judicial Circuit (the Wayne County Judges) cannot accept the statement of the case made on behalf of Defendants-Appellants, Wayne County Board of Supervisors (the County) in the Petition for Certiorari (the Petition) because such statement is incomplete and does not fairly present the issues.

1. The County now says (Petition, p. 5) that the "prime

factor" for the rejection of the Wayne County Judges' request for seven probation officers, four law research clerks and a judicial assistant "was the financial ability of the County to meet requests for increased personnel from current revenue." To the contrary, the reason given by the Ways and Means Committee of the Wayne County Board of Supervisors for such rejection of the request for any additional probation officers was stated to be:

> " 'Over a period of years the Board of Supervisors has sought the cooperation of the judges of the Circuit and Recorder's Courts to obtain amendatory legislation which will eliminate the discrimination against the County of Wayne of being ineligible to receive the same probation officer service paid by the State of Michigan which is provided by the State for other counties and courts.[1] It is the judgment of the Committee that the County should not continue to fund with local taxpayers money the complete needs of the probation services of these two courts while the remainder of the courts of the State enjoy substantial assistance from the State. If Wayne County obtained, on a proportional basis, this aid from the State it would provide substantially increased probation services over and above that which is proposed to be provided by the addition of seven new positions. The Committee believes that as long as the County of Wayne continues to meet the needs of this probation service, neither the State nor the

[1] Under C.L. '48, 791.225, MSA 28.2295, it is provided that state service grants may be given to Counties when it shall appear "that any county is unable to equitably maintain its probation program according to the standards set by the state bureau of probation." But, this statute by its terms does not apply to counties such as Wayne County, having a population in excess of 500,000 (C.L. '48, 791.226; MSA 28.2296). Probation in Wayne County is governed by a different statute, C.L. '48, 771.1, et seq.; MSA 28.1131, et seq., which does not provide for any state assistance.

representative of the two courts will hasten the amendatory change which will give equitable State support to the probation service needs of Wayne County.

We, therefore, are recommending deletion of the following new positions proposed by the Board of Auditors:

Circuit Court Probation Department—Eliminate two new positions of Probation Officer I and two desks and chairs.' " *(Pre-Trial Stipulation (d)* and *Exhibit 1).*

It was conceded at trial that the only budgetary cuts made in the Auditors' budget by the County were in connection with the budget of the Wayne County Judges. The total budget ultimately adopted by the County for the fiscal year 1967-68 was $127,160,325.00. The total annual salary cost of the additional employees requested by the Wayne County Judges was $193,096.00.

2. Prior to the filing of this Petition, the County did not at any time complain that Judge William John Beer of the Oakland County Circuit Court (designated to hear this cause by the Michigan Supreme Court Administrator) was personally biased or prejudiced against the County or had any personal or pecuniary interest in the litigation.

3. During the trial, the County did not contest the factual showing made by the Wayne County Judges:

(a) as to the reasonable necessity for the requested additional Probation Officers, Law Clerks and a Judicial Assistant;

(b) as to the reasonableness of the salaries established for such personnel; or

(c) as to the acute and urgent need for additional Probation Officers in light of the then existing caseloads.

Instead, the sole defense asserted by the County was that the Wayne County Judges were merely another subordinate branch of the county government and therefore subject to the absolute control of the County in all fiscal matters, and as a corollary thereto, that the matter of appropriations for the functioning of the Wayne County Circuit Court was within the absolute and unrestricted control of the County.

The trial court rejected this defense as a matter of law and entered judgment in mandamus for the Wayne County Judges.

The Michigan Court of Appeals, the intermediate court of appeals in Michigan, unanimously affirmed the trial court on February 10, 1969, 15 Mich App 713; 167 NW 2d 337. The Court of Appeals rejected the County's contention that the County had been deprived of due process of law under the Fourteenth Amendment to the Constitution of the United States because an Oakland County circuit judge had heard the case, saying, 15 Mich App at 731 (167 NW 2d 337):

> "It is the county's contention that no circuit judge could be impartial since the presented issue concerned the power of all Michigan circuit judges and; thus, all circuit judges at one time or another have been or may well be faced with a need for additional funds for judicial purposes which their county boards of supervisors are unwilling to provide.
>
> We note that our decision is not predicated upon any factual determination made by the trial judge. We do not think that the resolution of the legal issues presented by this case has been prejudiced

> by the fact that they were first considered by a circuit judge just because that judge may wish to join with his colleagues some day in exercising the power claimed by the Wayne circuit judges. The county's argument would make ineligible all Michigan judges because the judges of our Court and the justices of the Michigan Supreme Court may some day be obliged to assert and exercise the inherent power of an independent branch of government."

Subsequent to the decision of the Michigan Supreme Court on rehearing as set forth in Appendix A to the Petition, the County petitioned the Michigan Supreme Court for an order staying the execution of the judgment set forth in Appendix B to the Petition. Such Petition was denied by the Michigan Supreme Court. Thereafter, the County filed a Petition for Stay of Execution of Judgment Pending The Filing And Disposition of a Petition for Writ of Certiorari with Mr. Justice Potter Stewart, averring that the "60-day grace period" given by the Michigan Supreme Court "will expire December 19, 1971." Mr. Justice Stewart denied such Petition on December 21, 1971.

REASONS WHY WRIT SHOULD NOT BE GRANTED

The County advances two reasons why certiorari should be granted:

1. That the latest action of the Michigan Supreme Court "violates [the] separation of powers doctrine" and "denies to the Petitioner Wayne County, a political subdivision and an arm of the State of Michigan, a republican form of government guaranteed by the Constitution of the United States, Article IV, Sec. 4." (Petition, p. 14.)

2. That the County was denied due process of law under the Fourteenth Amendment because it was allegedly de-

nied "a neutral forum" because a judge for the third judicial circuit allegedly heard the case involving the Judges of the Third Judicial Circuit. (Petition, p. 14.)[2]

This Court should disallow petitioner's request for all or any one of the following reasons:

A. No federal question is presented.

No federal question is presented.

B. Re republican form of government.

The issue as to whether a state has a republican form of government is non-justiciable. *Luther* v *Borden*, 7 How 1 (1849); *Highland Farms* v *Agnew*, 300 U.S. 608, 612-613 (1937).

C. The County has no standing to invoke the Fourteenth Amendment.

The County, "a political subdivision and an arm of the State of Michigan" (Petition, p. 14), does not have standing to invoke the Fourteenth Amendment.

In *Coleman* v *Miller*, 307 U.S. 433, 441 (1939), this Court said of municipal corporations, "being but creatures of the State, [they] have no standing to invoke . . . the provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator." See also *Hunter* v *City of Pittsburgh*, 207 U.S. 161, 178-179 (1907).

D. The County and its agencies are not "persons" within the protection of the Fourteenth Amendment.

The County and its agencies bring this action solely in

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[2] This formulation of the issue is incorrect and misleading. Judge William John Beer, who originally heard the case, was a judge of the Sixth Judicial Circuit, Oakland County, sitting by special designation in the Third Judicial Circuit, Wayne County. (See Petition, p. 6.)

their official capacity as a subdivision of state government and therefore are not "persons" within the meaning and protection of the Fourteenth Amendment. *Columbus & Greenville Railway Co.* v *Miller*, 283 U.S. 96, 99, 100 (1931); *Risty et al, County Commissioners et al* v *Chicago, Rock Island & Pacific Railway Company*, 270 U.S. 378, 390 (1926).

E. Re separation of powers.

The Michigan Supreme Court recognized the doctrine of separation of powers. Indeed, its latest opinion reported as Appendix A to the Petition is based in large part upon such doctrine of separation of powers.

The judiciary's power to compel funds for its reasonable needs from the legislative branch only maintains a proper balance between the legislative and judicial branches of government. Contrary to the County's assertion, the inherent power of the judiciary as stated by the Michigan Supreme Court does not make the judiciary supreme as against the legislative branch in Michigan, except in the limited area of the judiciary's constitutionally mandated power and responsibility to dispense justice as set forth in the Michigan Constitution, 1963 Article VI, Sec. 1., Sec. 4.[3]

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[3] **Judicial power in court of justice; divisions. SECTION 1.** The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house.

General superintending control over courts; writs; appellate jurisdiction. SEC. 4. The supreme court shall have general superintending control over all courts; power to issue, hear and determine prerogative and remedial writs; and appellate jurisdiction as provided by rules of the supreme court. The supreme court shall not have the power to remove a judge.

The latest holding of the Michigan Supreme Court in this respect is in accord with holdings of the highest courts of other states. *State, ex rel Weinstein* v *St. Louis County,* 451 SW 2d 99 (Mo. 1970); *Noble County Council* v *State, ex rel Fifer,* 234 Ind 172, 125 NE 2d 709 (1955); *Commonwealth, ex rel Carroll* v *Tate,* 442 Pa 45, 274 A 2d 193 (1971), cert. den. 402 U.S. 974 (1971).

In any event, however, the matter of separation of powers or lack thereof does not present any question under the Federal Constitution. The County does not cite and there is no provision in the Federal Constitution requiring the states to provide for the separation of powers. *Dreyer* v *Illinois,* 187 U.S. 71, 83-84 (1902); *Highland Farms* v *Agnew, supra,* 300 U.S. at 612-613.

F. Re disqualification of trial judge.

The argument that the County advances that all circuit judges of the State of Michigan were disqualified by reason of bias and self-interest from hearing the case would lead to the absurd result that no judicial relief would have been available to the Wayne County Judges, because under the County's theory, the entire judiciary in Michigan was in fact directly interested in the outcome of the case and therefore disqualified. This Court, itself, has over objection heard and decided a case in which its own interest was far more direct and immediate than that of the circuit judge in the case at bar. *Evans* v *Gore,* 253 U.S. 245, 247-248 (1920).

If the County is correct in its present contention, then the Supreme Court should not have heard *Marbury* v *Madison,* 5 U.S. 137, because there for the first time this Court enunciated the doctrine that the Court could nullify legi la-

tion, which the Court held to be in conflict with the Constitution, a matter which vitally concerned the power of the Court.

CONCLUSION

The Michigan Supreme Court on rehearing adopted the original Dethmers-Black opinion (reported as Appendix F to the Petition). In that opinion, the Court noted:

> "The reasonableness of the amounts asked for by the Wayne judges to provide such help is not contested, nor could it be. All such questions were settled by proof or formal concession, leaving only the real defense; that the defendant county simply hasn't sufficient money to meet all demands upon the county treasury and that it has the exclusive power to determine and allocate where its available funds should go. That defense is simply that the judicial system of Michigan lacks the power to create valid charges upon funds of the county. It was rejected in the *Stowell Case, supra,* and we should reject it now."

For the foregoing reasons, the Court should deny the Writ for Certiorari.

Respectfully submitted,

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